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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-609

JOHN L. STEBBINS, JR.,
Petitioner,

v.

JOHN C. WEAVER and THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,
Respondents.

BRIEF AND SUPPLEMENTAL APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

As determined by the United States Court of Appeals for the Seventh Circuit, there are three questions which that court resolved, as follows:

1. Plaintiff did not have a property interest sufficient to require the Fourteenth Amendment's procedural protections.

2. Since there was no allegation that defendants injured his good name, reputation, honor, or integrity by charging him with dishonesty or immorality and there has been no public disclosure of the reasons for the denial of tenure, he has not been deprived of liberty.

3. Plaintiff was not denied substantive due process, since substantive due process is no greater than the right to procedural due process in this type of case.

STATEMENT OF CASE

This is an action where the plaintiff sought declaratory and injunctive relief under 42 U.S.C. §1983, allegedly because he was denied tenure in the Mathematics Department of the University of Wisconsin-Milwaukee campus of the University of Wisconsin System. In his complaint filed with the district court he contended that he was informed that he could eventually expect tenure if he met certain standards of professional competence and that he met those standards. On a motion to dismiss, the district court took as true the plaintiff's allegations and determined that whatever due process was required it was provided by the defendants and plaintiff had failed to state a cause of action.

On appeal, the Court of Appeals for the Seventh Circuit also took as true plaintiff's allegation that he was informed that he could eventually expect tenure if he met certain standards of professional competence. The court of appeals concluded, however, that plaintiff did not have a property interest sufficient to require the Fourteenth Amendment's procedural protections, suffered no loss of liberty, and was not denied substantive due process.

Petitioner now seeks a writ of certiorari from this court, still alleging denial of due process in connection with his failure to obtain tenure at the University of Wisconsin-Milwaukee. The record shows and the petition reiterates that petitioner was on a probationary tenure track from 1966 until January of 1970, when the Executive Committee of the Mathematics Department at the university voted to terminate his appointment. Upon his request, he was given reasons why the Executive Committee voted not to grant tenure. These reasons, that his research was not such as to warrant promotion and that his area was adequately covered by tenured faculty, were not published beyond the records of the university.

On March 12, 1970, the United States District Court for the Western District of Wisconsin decided *Roth v. Board of Regents of State Colleges*, 310 F. Supp. 972 (W.D. Wis. 1970), in which it was determined that Roth, a nontenured professor, was entitled by due process to a nonadversary-type hearing where Roth could present information concerning his qualifications. Therefore, in March of 1971, the Executive Committee of Professor Stebbins' department held hearings on the issue of reopening its earlier decision denying him tenure. The hearing was held in accordance with the guidelines specified by the district court in *Roth*. On July 1, 1971, the Court of Appeals for the Seventh Circuit affirmed the district court decision in the *Roth* case. However, this court reversed on June 29, 1972. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Nearly two years after this court decided *Roth*, a motion to dismiss the petitioner's case was filed with the United States District Court for the Western District of Wisconsin. On June 3, 1975, the trial court ruled and held that the complaint did not state a claim that plaintiff had been denied the protections afforded him by the due process clause of the Fourteenth Amendment. Judgment was entered dismissing the action. On June 13, 1975, the district court stayed judgment and permitted Stebbins to file a motion to amend and supplement the complaint. On July 3, 1975, the district court, in an opinion and order, denied the motion and vacated the stay order previously entered.

Stebbins appealed to the Court of Appeals for the Seventh Circuit from the opinion, order, and judgment of June 3, 1975, and the opinion and order of July 3, 1975, and the defendants cross-appealed on the Eleventh Amendment and 42 U.S.C. §1983 "person" jurisdictional rulings by the trial court.

REASONS FOR DENYING WRIT

I. Petitioner Has Failed To Comply With Supreme Court Rule 19 (1) (b).

This is a petition for certiorari to the Court of Appeals for the Seventh Circuit. The decision of the circuit court involved an interpretation of the Fourteenth Amendment which is consistent with the decisions of this court regarding due process protections for liberty and property interests for a nontenured faculty member at a public educational institution where the faculty member is denied tenure. The court of appeals decision is not in conflict with the decision of another court of appeals on the same matter and no important question of federal law was decided which has not been decided by his court.

None of the other considerations governing review on certiorari from the court of appeals decision set out in Rule 19 (1) (b) has been shown by the petitioner to be applicable to this petition for certiorari.

II. No Property Rights Involved.

Petitioner contends that the court of appeals exceeded subject matter jurisdiction by using different reasoning than that employed by the district court in affirming the district court's judgment. It is contended that since the respondents herein did not cross-appeal from Judge Doyle's determination that Stebbins was entitled to some form of due process hearing before denial of tenure, the circuit court lacked subject matter jurisdiction. Petitioner relies on Rule 3 (c) of the Federal Rules of Appellate Procedure for this contention. However, it is clear from the cases that where, as here, a notice of appeal is taken from an entire judgment (Supp. A-1), such an appeal draws into question all rulings producing the judgment. *Automobile Ins. Co. v. Barnes-Manley Wet Wash Laundry Co.*, 168 F. 2d 381, 386 (10th Cir.), and cases cited,

cert. denied, 335 U.S. 859 (1948); *Roth v. Hyer*, 142 F. 2d 227, 228 (5th Cir.), cert. denied, 323 U.S. 712 (1944); *M.T. Reed Const. Co. v. Virginia Metal Products Corp.*, 214 F. 2d 127 (5th Cir. 1954); and *Herron v. Rozelle*, 480 F. 2d 282, 285 (10th Cir. 1973).

Accordingly, the appeal filed by the petitioner herein from the district court judgment brought to the court of appeals that judgment as a whole for review and all questions and rulings producing the judgment were before the court for determination.

Next, it is contended under the rationale of *Bishop v. Wood*, 96 S.Ct. 2074 (1976), that the court of appeals should not have adopted different reasoning in regard to the "property" issue, since the trial judge is thoroughly familiar with the law of the locality respecting the University of Wisconsin higher educational employment system. Petitioner reads more into *Bishop v. Wood* than was actually stated. In that case, this court said merely that where the district judge had interpreted the law of the locality and the court of appeals agreed with that interpretation the supreme court would not undertake an independent determination of the law of the locality.

Petitioner also contends that the court of appeals incorrectly equated Professor Roth's employment status in *Board of Regents v. Roth, supra*, at the Oshkosh campus of the state college system, with Professor Stebbins' employment status at the Milwaukee campus of the University of Wisconsin System, which is governed by a different statute.

Although the statutes and rules are not identical, the basic provisions for attaining tenure in both systems require specific administrative action, and appointments are probationary until tenure is achieved. (Supp. A-3) Therefore, there was no substantial misstatement of the tenure status of Professor Stebbins as compared to Professor Roth. Under the applicable regulations and statutes, Professor Stebbins had no more objective expectation of continued employment than did Professor Roth.

Petitioner contends, however, that he did have a clear objective expectation of continued employment and that because of this expectation and his allegation of de facto tenure similar to that in *Perry v. Sindermann*, 408 U.S. 593 (1972), he has a property interest that requires due process protection. This is the crux of petitioner's complaint concerning the disposition of this case by the Seventh Circuit Court of Appeals. However, he misunderstands the holding of this court in *Perry v. Sindermann, supra*. In that case the teacher had been employed for a number of years at an institution where there was no tenure system. The teacher alleged that there were mutually explicit understandings that amounted to a claim of entitlement and that he was being denied this entitlement on the basis of his exercise of a constitutionally protected interest in free speech. This court said that the teacher employed for a number of years at the same institution should be permitted to show that while no explicit tenure system existed, a de facto system did exist.

The court pointed out, at 408 U.S. 603:

> "*** Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency."

Thus, assuming that Professor Stebbins has alleged a de facto tenure similar to that in *Perry v. Sindermann, supra*, his only entitlement is a hearing where he could be informed of the grounds for his nonretention and challenge their sufficiency. The record is clear in this case that the reasons for Stebbins' nonrenewal were given to him (A. 22); the reasons being that his research was not such as to warrant promotion and his area, namely, complex analysis, was adequately covered by tenured faculty in the department. It is also clear from the record (A. 22) that the Executive Committee held hearings for four days, during which time the plaintiff was given an opportunity to present information

concerning his qualifications. At that hearing he had ample opportunity to present any evidence which might have indicated that there were understandings outside of the ordinary "tenure track" which would support his objective expectations of continued employment. There is no allegation that such evidence was offered.

Petitioner also contends that the common law of contracts of the State of Wisconsin taken with the other statutes, regulations, guidelines, and documents create a "property" right and Professor Stebbins' objective expectations of continued employment. This court has characterized teachers' tenure statutes as being of two types. One type creates a contract between the states and the individual teacher, *State v. Brand*, 303 U.S. 95 (1938), and the other type is declaratory of state policy, *Phelps v. Board of Education*, 300 U.S. 319 (1937), and *Dodge v. Board of Education*, 302 U.S. 74 (1937). In the *Brand* case, this court concluded that the statute created a contract between the state and the individual teacher because the highest court of that state has so construed the statute. In *Phelps* and *Dodge*, the state courts had construed the statutes in question as being merely declaratory of state policy and not creating contracts between the state and the individual teacher. The Supreme Court of Wisconsin, in *Morrison v. Board of Education*, 237 Wis. 483, 297 N.W. 383 (1941), held that a similar teachers' tenure act applying to public schoolteachers in Wisconsin was declaratory of state policy and not a contract between the state and the individual. Accordingly, there is no common law of contract in Wisconsin to support Professor Stebbins' alleged objective expectation of continued employment.

III. There Is No Showing That Petitioner Was Denied Liberty.

Petitioner contends that because the reasons for denial of tenure were disclosed at the request of the petitioner and were placed on the records of the university, there was "public

disclosure" which affects the liberty rights of the petitioner within the meaning of the due process clause of the Fourteenth Amendment. The circuit court concluded that the reasons given for Stebbins' nonretention did not injure his good name, reputation, honor, or integrity, that he is free to seek another job and there was no public disclosure of the reasons for the denial of tenure. *Board of Regents v. Roth, supra,* and *Bishop v. Wood, supra,* clearly support that conclusion. There has been no allegation of dishonesty or immorality, and the mere fact of denial of tenure does not deprive him of liberty.

Referring to *Roth*, in *Bishop v. Wood*, 96 S.Ct. 2079, this court said:

> "*** we recognized that the nonretention of an untenured college teacher might make him somewhat less attractive to other employers, but nevertheless concluded that it would stretch the concept to [sic] far 'to suggest that a person is deprived of "liberty" when he simply is not retained in one position but remains as free as before to seek another.' ***"

Here, the reasons given for nonretention, even if made public, would not affect petitioner's interest in his good name, reputation, honesty, or integrity. The conclusion of the Executive Committee, whose members are not defendants in this lawsuit, that his research was not sufficiently good to warrant promotion and that his area of complex analysis was adequately covered by tenured faculty is not a deprivation of liberty within the meaning of the due process clause. See *Scheelhaase v. Woodbury Central Community Sch. Dist.*, 488 F. 2d 237 (8th Cir. 1973), cert. denied, 417 U.S. 969 (1974) (low scholastic accomplishment). At page 244, the court said:

> "*** Such matters as the competence of teachers, and the standards of its measurement are not, without more, matters of constitutional dimensions. They are peculiarly appropriate to state and local administration."

In a concurring opinion in both *Perry v. Sindermann, supra,* and *Board of Regents v. Roth, supra,* at 408 U.S. 603, Chief Justice Burger said:

> "*** The Court holds today only that a state-employed teacher who has a right to re-employment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for nonrenewal of his contract. ***"

If we assume that Stebbins was entitled "to some form of prior administrative or academic hearing on the cause for nonrenewal of his contract," the record is clear that such hearing was afforded. The trial judge, in his opinion, at A-32, pointed out:

> "It is plain from the complaint that during the period of more than two years while the initial decision of the Executive Committee was under review, plaintiff was afforded: a statement of the reasons why the university intended not to promote him; notice of a hearing at which he could respond to the stated reasons; and a hearing. ***"

And, at A-38:

> "*** But according to the allegations of the complaint, the statement given the plaintiff permitted him to marshall and present at his hearing evidence overwhelmingly favorable to him and so extensive that the hearing lasted some four days."

IV. Substantive And Procedural Due Process Are The Same In This Type Of Case.

Petitioner contends that the circuit court's limitation on review of substantive due process issues amounting to gross abuse, ignores this court's long line of cases which establish that state administrative action which deprives the citizens of

"property" or "liberty" irrationally constitutes a deprivation of due process of law.

Judge Stevens made it clear, however, in *Jeffries v. Turkey Run Consolidated School District,* 492 F. 2d 1, 4 (7th Cir. 1974), that the absence of a property or liberty interest is fatal to a substantive as well as a procedural due process claim. The cases upon which the petitioner principally relies for his substantive due process claim, which are cited at page 23 of the petition, are explained in *Roth* and *Sindermann* as ones involving property or liberty interest. See, also, *Buhr v. Buffalo Public School District No. 38,* 509 F. 2d 1196 (8th Cir. 1974). This court made it clear in *Bishop v. Wood, supra,* that the United States Constitution did not require the federal court system to be the appropriate forum in which to review personnel decisions of public agencies. The court said, at 96 S.Ct. 2080:

> "*** In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions."

Accordingly, in the absence of the showing of a property or liberty interest on the part of the petitioner, the federal courts will not review an alleged arbitrary administrative determination.

In the case of *Velger v. Cawley,* 525 F. 2d 334 (2nd Cir. 1975), cert. granted, 96 S.Ct. 3188 (1976) (No. 75-812), the court of appeals determined that a probationary policeman had been deprived of liberty interest and was entitled to a hearing to confront allegations placed in his personnel file. These allegations related to an attempted suicide by the police officer and were made available to inquiring prospective public and private employers and it resulted in many instances of loss of prospective employment.

The distinguishing features are apparent. Here there is no allegation which would affect Stebbins' good name beyond the normal consequences of not being granted tenure, and he was given a hearing which lasted four days in which he was given the opportunity to explain any of the reasons given for his nonrenewal. In addition, Stebbins was given appeal to his department, the dean, the chancellor, and the Board of Regents.

CONCLUSION

The questions before the court are not unique, they present no issues not previously considered and decided by this court, and they present no issues on which there is substantial disagreement among the various courts of appeals.

Petitioner failed to show a property interest protectable under the due process clause of the Fourteenth Amendment. His allegation concerning expectancy of acquiring tenure is a subjective assessment which conflicts directly with the written regulations of the University of Wisconsin in effect at the time of his employment in 1965. Sections 10A.10 and 10A.11 specifically provide the procedure for acquiring tenure at the University of Wisconsin-Milwaukee. One sentence in sec. 10A.11 forewarns any probationary faculty member that tenure is not granted by promises or subjective understandings. It reads: "Tenure is granted only by specific administrative action to that effect." (Supp. A-3.)

No liberty interest of the petitioner was impaired by the reasons given for his nonrenewal: first, because there was no publication of the reasons beyond the university records, and, secondly because the reasons given are innocuous and will have little adverse effect upon petitioner's ability to secure employment as a teacher.

The constitutional right to substantive due process is no greater than the right to procedural due process. Therefore, in

the absence of a showing of a denial of an interest in liberty or property, the claim of denial of substantive due process is fatally defective.

Even if there had been a showing of the impairment of property or liberty interest, the remedy under such circumstances would be a due process hearing, which was provided to the petitioner in this case prior to the effective date of his termination.

No cause has been stated for the issuance of the writ, and the petition, therefore, should be denied.

Respectfully submitted,

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RESPONDENTS' SUPPLEMENTAL APPENDIX

NOTICE OF APPEAL (formal parts omitted).

To: Honorable Joseph W. Skupniewitz
Clerk of Court
United States District Court
Western District of Wisconsin
215 Monona Avenue
Madison, WI 53709

NOW COMES the Plaintiff, John L. Stebbins, Jr., by his attorneys, Goldberg, Previant & Uelmen, and Walter F. Kelly, and herewith files his Notice of Appeal to the United States Court of Appeals for the Seventh Judicial Circuit.

Plaintiff appeals the Opinion, Order and Judgment of June 3, 1975 and the Opinion and Order of July 3, 1975 of the Honorable James E. Doyle of the United States District Court for the Western District of Wisconsin.

Dated this 23rd day of July, 1975.

GOLDBERG, PREVIANT & UELMEN AND
WALTER F. KELLY
By:

/s/ Walter F. Kelly
Walter F. Kelly, Esq.

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LAWS AND REGULATIONS
OF THE UNIVERSITY OF WISCONSIN

CHAPTER 10
ACADEMIC PERSONNEL

PREAMBLE
REGENT'S STATEMENT OF POLICY

In adopting this codification of the rules and regulations of The University of Wisconsin relating to academic tenure,

the Regents reaffirm their historic commitment to security of professorial tenure and to the academic freedom it is designed to protect. These rules and regulations are promulgated in the conviction that in serving a free society the scholar must himself be free. Only thus can he seek the truth, develop wisdom and contribute to society those expressions of the intellect that ennoble mankind. The security of the scholar protects him not only against those who would enslave the mind but also against anxieties which divert him from his role as scholar and teacher. The concept of intellectual freedom is based upon confidence in man's capacity for growth in comprehending the universe and on faith in unshackled intelligence. The University is not partisan to any party or ideology, but it is devoted to the discovery of truth and to understanding the world in which we live. The Regents take this opportunity to rededicate themselves to maintaining in this University those conditions which are indispensable for the flowering of the human mind. — The Regents of The University of Wisconsin, January 10, 1964.

10A.10 *Appointment, Reappointment, Tenure, Non-Retention and Notification of Assistant Professors.* A person who is promoted to assistant professor after seven years of service as a full-time instructor at this University shall be given tenure. If he is promoted after a shorter period of such service, his appointment and subsequent reappointment are for such terms as make his total period of service under probationary appointment in the ranks of instructor and assistant professor in this University not more than seven years. If he is appointed from outside, the appointment is normally for a term of three years. After not more than seven years of service at this University as an assistant professor or after a total of not more than seven years of full-time service at this University in the ranks of instructor

and assistant professor, the assistant professor shall be either granted tenure with or without promotion, or notified in writing by the department or the administration one year before the end of his service that he will not be recommended for retention, promotion, or tenure. After notification of non-retention on the permanent staff, any appointments shall be annual and shall not exceed two. These provisions do not imply any obligation of reappointment, nor do they preclude recommending an assistant professor for promotion or tenure after a shorter period of service than seven years.

10A.11 *Tenure Not Granted Solely Because of Years of Service.* Tenure is not acquired solely because of the number of years of service. Tenure is granted only by specific administrative action to that effect. The previous provisions as to duration of the probationary period merely establish, for the benefit of the University and of its staff members, limits beyond which such decisions and actions may not be delayed.

CERTIFICATE OF SERVICE

I, LeRoy L. Dalton, Assistant Attorney General of Wisconsin, a member of the Bar of this Court, hereby certify that I have this day served the foregoing Brief in Opposition to Petition for Writ of Certiorari upon the Counsel of Record for the Petitioner herein, by mailing 3 copies thereof with first-class postage prepaid, addressed as follows:

Gerry M. Miller
Attorney at Law
211 West Wisconsin Avenue
Milwaukee, Wisconsin 53203

Dated this 2nd day of December, 1976.

LE ROY L. DALTON
Assistant Attorney General
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Counsel of Record for Respondent